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Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 199

ELMER MICHAEL WALSH, Sheriff of Cook County, Illinois,

Petitioner,

vs.

UNITED STATES OF AMERICA, Ex Rel, RALPH E. WHITE,

Respondent.

PETITION FOR REHEARING.

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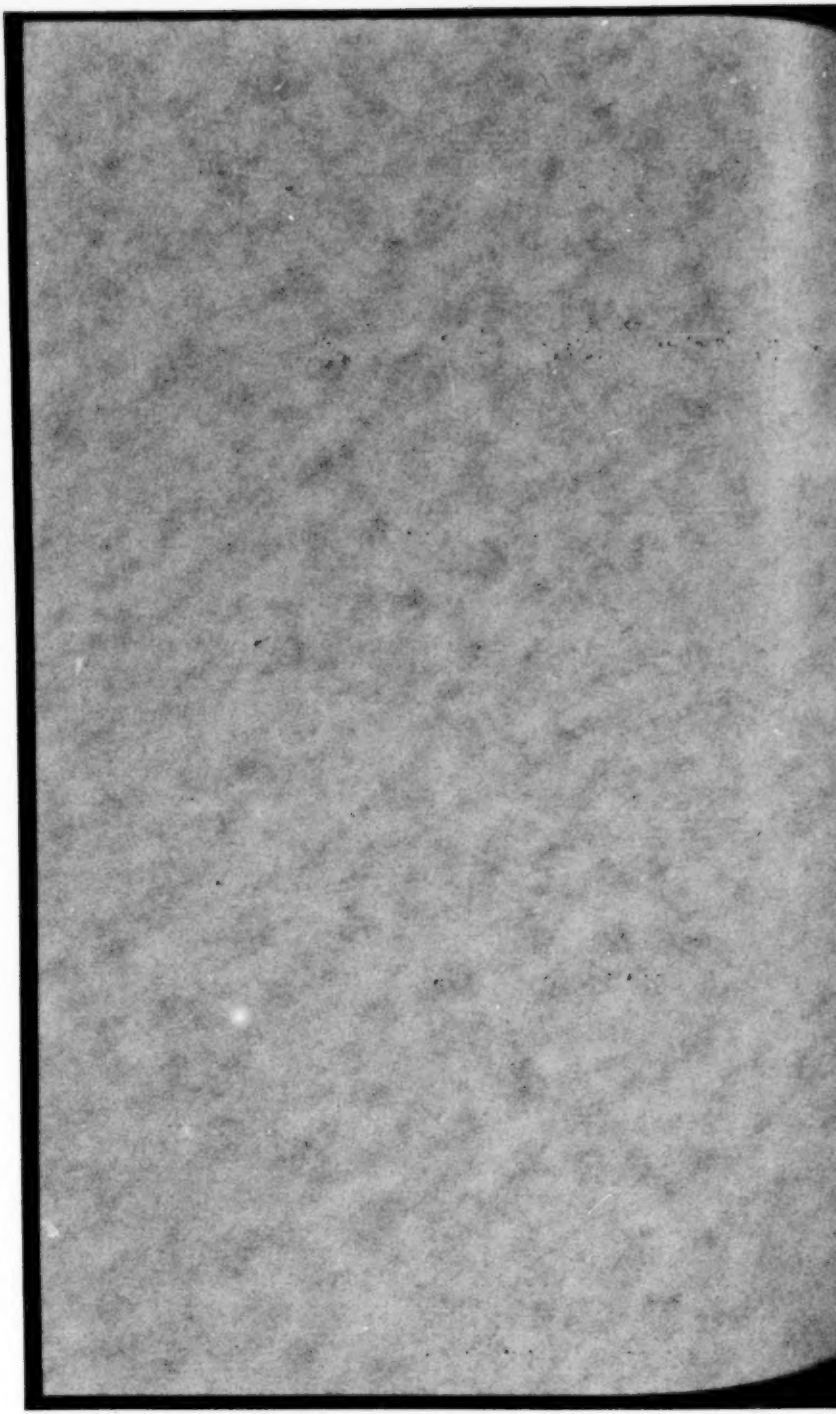

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To the Honorable Justices of the Supreme Court:

Now comes Ralph E. White the relator and respondent in said cause and requests the court that it reconsider the record and its judgment order entered in this case and grant a rehearing of the cause and consider it upon its merits and for reasons suggests to the court as follows:

I.

This court entered a per curiam order herein on October 10, 1949, as follows:

> "Per Curiam: The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court with directions to discharge the writ of habeas corpus and remand the respondent to custody."

Inasmuch as no ground is specified upon which the court based its order counsel must seek by elimination to find one to which to address this petition.

We assume naturally that the order was not entered upon any theory that the District Court was without jurisdiction to entertain a habeas corpus proceeding, as this court has always recognized the jurisdiction of the District Court to entertain the proceeding, and put the exercise of that jurisdiction in the sound discretion of the court.

The District Court made findings of fact (Tr. 394-407) which have not been attacked or overthrown; and the opinion of the District Court (Tr. 384-394) shows the great care and consideration given to the cause by the District Judge. The discretion exercised was upon a full hearing, argument, advisement and study.

The learned Judge who wrote the opinion in the Court of Appeals for the Seventh Circuit, Honorable Walter C. Lindley, demonstrates that the mandamus judgment of the Superior Court of Cook County was entered without jurisdiction and its order of imprisonment under that judgment was likewise void and the imprisonment of the relator White without legal right and in violation of basic constitutional rights.

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The action of this court must therefore be based upon some condition of the record which this court considers so obvious and fatal as to preclude reasonable argument.

The discretion exercised by the District Court was not arbitrary.

We respectfully suggest that looking at this cause in the light of the record and the judgments of the District Court, and the Court of Appeals it is obvious that the relator White stands before the court as a United States citizen unjustly held and imprisoned by a void judgment of an Illinois Court; so that where the State authorities insist upon a continuation of such imprisonment, it was within discretion to grant the writ and discharge the prisoner.

We therefore urge that if the judgment of the District Court was right then ultimate justice would say that any procedural error leading up to that judgment would not outweigh the justice of the final judgment, nor cause it to be reversed.

It was considered by the learned jurist who wrote the Opinion of the Court of Appeals that the case of *Wade* v. *Mayo*, 334 U. S. 674 had settled that question with the statement that this court would not construe a "failure to invoke the descretionary certiorari powers of this court into an absolute denial of the District Court's power to entertain a habeas corpus application" (P. 681).

We suggest that to adjudge otherwise would cause the relator to suffer imprisonment for procedural irregularities rather than for the offence.

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White had exhausted his State remedies.

Wade v. *Mayo* is also authority for the proposition that the exhaustion of one remedy is sufficient and that it is not necessary to exhaust a collateral remedy as a prerequisite to making an application to the District Court for habeas corpus relief. It is there said, "The exhaustion of but one of several available alternatives is all that is necessary." (P. 677) White appealed the judgment of the mandamus case and also the contempt judgment to the Appellate Court where both were affirmed. Petition for leave to appeal was filed in the Supreme Court of Illinois as to both cases and was denied, leaving the judgments as final in the Appellate Court. Certiorari was then sought in this court to review the judgments in the Appellate Court of Illinois which was denied. That was an exhaustion of remedies by direct attack.

We therefore suggest that even if it be considered that relator had not entirely and completely exhausted all State procedure a just judgment should not be overturned for the sake of a correct procedure.

Relator did not waive his right to have due process of law.

If it should be that this court regarded the case of *Parker* v. *People of the State of Illinois*, 92 Law Ed. 685 as a precedent controlling here there are two reasons why that case should not be so considered: (1) The question of whether one has been denied due process of law is not a construction of the constitution within the meaning of Section 75 of the Illinois Civil Practice Act (Chap. 110, Sec. 75 Ill. Rev. Stat.) which provides that appeals where "a construction of the constitution is involved" shall go to the Supreme Court direct; and (2) There is a mandatory statute that if appeals are taken to the wrong court and it is

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found or adjudged that the case was wrongly appealed to such court it shall be the duty of that court to transfer it to the proper court where it shall proceed as if originally appealed there.

Those questions were not raised in the *Parker* case.

Those questions were raised and argued in the District Court and Circuit Court of Appeals. In his decision Judge Lindley obviously relied upon the ruling in the *Mayo* case that procedural errors should not control the ultimate justice of discretion.

Counsel for petitioner suggests in his petition for certiorari that where appeal was taken to a court that had no power to pass upon a "constitutional question" and also assigned error upon other questions upon which it had power to pass, such appeal was a waiver of right to have the constitutional question passed upon, and that such waver should apply to and control the District Court when habeas corpus relief is sought.

The discussion of this question requires an examination of the Illinois Constitution of 1870, the Act creating the Appellate Court of Illinois, and the Civil Practice Act of Illinois.

There is no provision of Illinois law routing appeals of cases in which federal questions are raised as there are in some other states. So far as Illinois law goes such federal questions go with the case on its general characteristics.

We will now discuss the questions suggested.

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SUGGESTIONS.

I.

Only such questions as require a constuction of some provision of the Constitution by pass the Appellate Courts.

Opposing counsel suggest that by taking an appeal to the Appellate Court of Illinois the relator waived the right to a determination of any "constitutional questions,"—basing that assertion upon provisions of the Civil Practice Act of Illinois. That viewpoint is a misconception of the requirements of the Statute.

The Statute of Illinois does not say "constitutional questions,"—which is the lawyer's expression for short, but the Statute uses the phrase "*construction of the constitution.*" a wholly different concept than constitutional questions as commonly spoken of.

Just because a litigant says that he is being deprived of a fundamental right guaranteed to him by the constitution, does not necessarily mean that he is calling for a construction of some provision of the constitution for, in most cases, he is asking only that the constitution be enforced,—but it be obeyed,—that he be protected by its plain provisions.

And when a defendant says that the enforcement of a sentence to imprisonment will deprive him of due process of law because of lack of jurisdiction of the court to enter it, he asks only that the basic guarantee be given play.

Most portions of constitutions are self enforcing,—that is they contain basic laws, declaring certain rights, guaran-

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teeing the citizen against certain ancient evils. They are plain and need no construction. They are to be enforced as written.

The type of case here is one where a public officer finds himself between two fires; he is directed to do certain acts by an Election Board with final jurisdiction, and power to order; and then by the Superior Court was ordered to do things to the contrary,—that court usurping a jurisdiction it had not.

Obedience to the statutory election board has brought upon White imprisonment by contempt process of the Superior Court.

In the contempt proceeding White defended, and said that the court took jurisdiction where it had none; that jurisdiction in such case was given exclusively to a Statutory Election Board and thereby withdrawn from the court, and that the court invaded the executive field of government and ordered him to do things in violation of his statutory duties.

For his adherence to his statory duties performed under an oath of office, White was given a sentence of imprisonment for six months for disobeying the court's order.

White claims the sentence deprives him of due process of law under the Federal and State Constitutions, a sentence of imprisonment without jurisdiction of subject matter.

The Appellate Court of Illinois has here held his appeal to be one involving a "*constitutional question*" and that such claim is due to be taken directly from the trial court to the Supreme Court; "which," as it says, "has exclusive jurisdiction to determine *constitutional questions*" (Tr.

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Thus the Appellate Court of Illinois refused to pass upon that question of defendant's constitutional right and the refusal also of the Supreme Court of Illinois to consider the case against denied due process of law.

It is respectfully contended that the imprisonment here was inflicted without jurisdiction or power to impose it; and, although the judgment imposes a penalty without due process of law, it involves no *construction* of either Federal or State Constitutions.

The constitution of the United States is a law to be obeyed the same as any enactment; and all amendments to it are now by virtue of the Fourteenth Amendment basic laws of the States, and are to be observed by State Courts which now enforce these rights as matter of course.

The duty of the State Courts to protect litigants in their constitutional guarantees should not be permitted by the Federal Courts to be brushed aside on any fiction that they involve a construction of the constitution for they do not. It is a simple case of obedience to basic law.

In the case there was full power in the Appellate Court to decide the question of due process of law which only invoved a question of jurisdiction of the court and not a construction of a constitution.

The Appellate Court gets its jurisdiction from the Illinois Constitution of 1870 and as we read that document the jurisdiction of the Appellate Court is unlimited in any case assigned to its decision by appeal or writ of error. Section 11 of Article VI of the 1870 Constitution provides that after 1874 the Legislature might create Appellate Courts

> "to which such appeals and writs of error as the general assembly may provide may be prosecuted from

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circuit and other courts, and from which appeals and writs of error shall lie to the Supreme Court in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved and in such other cases as may be provided by law."

That provision of the constitution does not say or infer that the jurisdiction of the Appellate Court may be limited by the legislature to *certain questions* arising upon a record. In the exercise of its jurisdiction it has all the dignity and power of the Supreme Court. It may decide every question upon the record in cases assigned to it by the legislature and the legislature has no power to limit that jurisdiction which flowed from the constitution when the court was established. The constitution did not withhold jurisdiction in any type of case. It only denied finality in criminal cases and cases involving a franchise or freehold or the validity of a statute, *i. e.*, writs of error would lie to the Supreme Court on such judgments from the Appellate Courts to the Supreme Court in such cases.

But there is no limitation upon the right to decide a constitutional question so called, or to place a construction upon the constitution. The legislature is to say what cases shall be heard on appeal or writ of error, and it assigns or designates types of litigation to it to hear.

Under the constitution it will be seen that the jurisdiction of the Appellate courts is unlimited, depending only upon specification by the legislature of the particular types of cases it might review. The legislature could have assigned to the Appellate Court the duty to pass only upon questions involving the constitution, which at that time was only a few years old, had it so desired.

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But the constitution gave the legislature no power to limit the jurisdiction of the Appellate Court, as such.

The Legislature established the Appellate Courts by "An Act to establish Appellate Courts," Approved June2, 1877 and fixed their jurisdiction by Section 8 of that Act, which is still in force (as amended) and which provides that they

> "shall have jurisdiction of all matters of appeal or writs of error from the final judgments, orders or decrees of any of the Circuit Courts, or the Superior Court of Cook County, or County Courts, or from the city courts in any suit or proceeding at law or in chancery other than criminal cases and cases involving a franchise or freehold or the validity of a statute,"

and providing in the same section that appeals and writs of error are to be taken direct to the Supreme Court "in all criminal cases and in cases involving a franchise or freehold or the validity of a statute." (Laws of 1877).

It will be noted that the Act says nothing about construction of the constitution, or cases involving the constitution, or constitutional cases, so-called. Nor does it grant any power to split up a cause of action in the Appellate Court. The jurisdiction is over the judgment orders or decrees, if it be not a criminal case, or one involving a franchise, freehold, or validity of statute. It is the power to review the judgment as an entirety that is assigned to the Appellate Court.

Obviously the Constitution placed no limit upon the *jurisdiction* of the Appellate Court and granted the Legislature no power to *limit* their jurisdiction except by designating the types of cases that shall be taken to those courts.

The Practice Act of 1877 (Approved June 2, 1877) provided that Appeals and Writs of Error in Criminal cases

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and cases in which a franchise or freehold or validity of a Statute is involved shall be taken directly to the Supreme Court in case *the party appealing* or prosecuting such writ of error *shall so elect excepting* in cases of chancery; and in chancery cases the appellant was required to file in the Supreme Court a transcript of the record including orders and decrees of the Appellate Court (Sec. 88, Chap. 110, Statutes of 1878).

In 1879 the Practice Act was amended so as to provide that "in all criminal cases, below the grade of felony, shall be taken directly to the Appellate Court; and in all criminal cases above the grade of misdemeanors, and in cases in which a franchise, freehold or the validity of a Statute or construction of the constitution is involved, and in all cases relating to revenue, or in which the state is interested as a party or otherwise, shall be taken directly to the Supreme Court." (Illinois Session Laws 1879, page 222; Murd's Rev. Stat. 1887).

The present Civil Practice Act of Illinois (Chap. 110, Sec. 75 Rev. Stat.) provides:

> "(Jurisdiction of Appellate and Supreme Courts.) 1) Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or validity of a Statute or a construction of the constitution is involved, and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenues, or in which the state is interested as a party or otherwise."

The Civil Practice Act does not specify the cases to be appealed to the Appellate Court. However Section 32 of an Act to establish Appellate Courts (Chap. 37, Rev. Stat.) sets out the jurisdiction of the Appellate Courts which with

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some amendments is the same as Section 8 of the Original Act of 1877. Section 32 of the Act under which this case in the Superior Court arose reads as follows:

> "The said Appellate Courts created by this Act shall exercise Appellate jurisdiction only and have jurisdiction of all matters of appeal or writs of error from the final judgments, orders or decrees of any of the Circuit Courts, or the Superior Court of Cook County, or County Courts, or from the city courts in any suit or proceeding at law, or in chancery other than criminal cases, not misdemeanors, and casese involving a franchise or freehold or the validity of a statute. Appeals and writs of errors shall lie from the final orders, judgments or decrees of the Circuit and City Courts and from the Superior Court of Cook County, directly to the Supreme Court, in all criminal cases and in cases involving a franchise or freehold or the validity of a Statute."

It seems that the phrase "construction of the constitution" first appeared in the Practice Act of 1879 and has been retained and appears in the present Civil Practice Act. At that date the Illinois constitution of 1870 was only a few years old and construction of its provisions was an important matter and by legislature was assigned to the Supreme Court for its consideration.

Words and Phrases shows Illinois as the only state in whose cases the phrase "constitutional question" is used and cites several Illinois cases.

Cases have arisen in other jurisdictions where the phrase "construction of the constitution" is used to designate where an appeal should be taken, whether to the Appellate or Supreme Court, and it is held that the phrase in its context imports some ambiguity or uncertainty making it proper that it should be passed upon by the Supreme Court.

In *Terre Haute R. Co.* v. *Erdel,* 158 Ind. 344 it was said in a case involving a statute fixing appeals where the con-

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struction of statutes and constitutions determined the court to which to appeal should be taken. The court said:

> "Every case in which there is in question, and such question is duly presented, either the validity of a franchise, or the validity of an ordinance of a municipal corporation or the constitutionality of a statute, state or federal, or the proper construction of a statute, or the rights guaranteed by the State of Federal Constitution and such case would be otherwise unappealable . . . shall be appealable directly to the Supreme Court for the purpose of presenting that question only," "means to interpret, to elucidate, to define and declare the meaning of that which is obscure and uncertain, and can have no application to a statute in which there is nothing doubtful or ambiguous in its terms. Construction can only be employed for the discovery of the true intent and meaning of an instrument and when the language is plain there can be no construction, because there is nothing to construe."

In *Turner* v. *State*, 185 Ga. 432, 195 S. E. 431 the court had under consideration a constitutional amendment which provided that the Supreme Court should have exclusive jurisdiction to correct errors of trial courts:

> "In all cases that involve the construction of the constitution of the State of Georgia or of the United States or treaties between the United States and foreign governments; in all cases in which the constitutionality of any law of the State of Georgia or of the United States is drawn in question."

It was held:

> "The words 'construction of the constitution' etc., as here employed, contemplate construction where the meaning of some provision of the Constitution is directly in question, and is doubtful by force of its own terms or under the decisions of the Supreme Court of the United States or of the Supreme Court of Georgia, and the provision of the constitution in which they are employed are not to be construed as

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> denying to the court of appeals jurisdiction of cases which involve mere application of unquestioned and unambiguous provisions of the constitution to a given state of facts."

To determine whether due process has been given to a litigant it is not necessary to construe the constitution of either jurisdiction, but only is it necessary to observe whether the judgment was entered with jurisdiction and whether the Fourteenth Amendment has been obeyed or applied. There is nothing to construe. The only question is one of jurisdiction,—obedience to the provisions of basic law. Jurisdiction absent, due process is denied.

In 16 C. J. S. p. 103, Sec. 50, subject constitutional law, it is said that constitutional provisions designed to safeguard individual rights such as the negative and prohibitive clauses of the Fourteenth Amendment need no construction.

And in 16 C. J. S. p. 1513, subject construction, it is said that construction can only be employed for the discovery of the true intent and meaning of an instrument and when the language is plain there can be no construction because there is nothing to construe for the word implies ambiguity and necessarily presupposes obscurity, doubt, and uncertainty.

In *United States* v. *Sprague*, 282 U. S. 716 the court said:

> "The constitution was written to be understood by the voters; its words and phrases were written in their normal, as distinguished from their technical, meaning; where the intention is clear there is no reason for construction and no use for interpolation or addition."

It is respectfully suggested that the Appellate Court either has jurisdiction over the *entire* case or none at all. It has no power to decide certain elements of the case and refuse to decide others. If the record assigns errors be-

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yond its jurisdiction to hear, it should refuse to take jurisdiction over the case as being one the legislature has not assigned to it or has withheld from it.

And here when the Appellate Court found the record that the Appeal was to the wrong court and that it had no jurisdiction it should have transferred it to the Supreme Court under Section 86 of the Civil Practice Act of Illinois.

So far as passing upon Federal questions where there has been a denial of due process of law or any other right secured by the Fourteenth Amendment the Appellate Court had ample constitutional power. By the rule as to a constitutional question being involved in the case it has always been the rule that the Appellate Court would be permitted to pass upon other than constitutional questions whereas if the rule as to jurisdiction is applied the Appellate Court could pass upon no issue in which a constitutional question were asserted for the constitution, from which the Appellate Court gets its jurisdiction does not split up an appeal into its several elements, with a right to pass on this, and a privilege to pass on that and a denial of the other. There never was, and there is not now, any jurisdiction in the legislature to direct, permit, or allow an Appellate Court to pass on some issues in a case and hold that other issues were waived; nor is there power in the Supreme Court of Illinois to decide that an appeal to the Appellate Court by a litigant waives a right to have his constitutional rights, State and Federal, passed upon. If the Appellate Court has no jurisdiction over one issue it has no jurisdiction over the case as a whole; for why should it be held that the most sacred of all rights,—those arising under the Fourteenth Amendment to the United States Constitution are waived because of some procedural error. There is no reason only the excuse of a prior erroneous decision.

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The State has no power to waive a Federal Constitutional right for a United States citizen.

By what right or power does a State through any of its agencies, assume to jockey a United States Citizen into a waiver of any right secured by the law of the land, the supreme law of the nation, by anything less than a conscious, definite, personal waiver upon the record.

The judicial department of Illinois is not the guardian and keeper of the sacred constitutional rights of a United States citizen and has no power, right, or authority to declare that by any procedural conduct in State Courts he has waived his rights under the Federal Constitution, while all the time he is crying out for protection of his federal rights in the proceeding.

It may be conceded that the state, through its agencies, may hold procedural conduct will waive State Constitutional rights of a State Citizen, but it is the duty of a state's agencies, particularly its judicial department, to affirmatively protect and defend, if need be, the rights of United States Citzens, entrusted through comity, to the States care. The State has no leave or license to betray the rights of a United States Citizen by deciding that a mere failure to follow State procedure is a waiver of federal constitutional rights. That is what was done in this case; and we respectfully suggest that there can be no waiver where there is no power or authority to put a United States Citizen in that position.

Here the State Court refused to pass upon the error assigned yet it split up the case, ignored his federal rights, and proceeding to imprison him upon the rights of a citizen of the State, as distinguished from those of a citizen of the United States. Those rights the Illinois Courts refused to pass upon.

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II.

The Statute requires transfer of a mistaken appeal to the proper court.

Section 86 of the Illinois Civil Practice Act provides for the transfer of cases to the proper court where it is adjudged that it is wrongly appealed to such court and that applies to the Appellate Court. The law reads:

> "Sec. 86. (Transfer of case appealed to wrong court). Where an appeal is taken to either the Superior or Appellate Court and it is found or adjudged that the case was wrongly appealed to such court, it shall be the duty of such court to direct the clerk to transmit the transcript and all files therein with the order of transfer to the Clerk of the proper court. On the receipt of such record the Clerk shall at once file the same and the case shall then proceed as if the same had been taken there from the inferior court. * * *"

It is a regular procedure at every term of the Supreme Court of Illinois for the Supreme Court to transfer cases from that court to the Appellate Court where the court in looking into the record has held that there is no franchise, no freehold, or constitutional question involved. Every volume has its cases; and the Statute provides for that procedure; and it is religiously followed by that court.

Strange as it may seem the Supreme Court recognizes and applies this Statute in all cases taken to that court, but if an unfortunate litigant charged with some offense, and with imprisonment awaiting him, chances to appeal to the Appellate Court and raises a question of his constitutional rights even under the Federal Constitution the Appellate Court refuses to pass upon the most sacred of all rights and holds them waived by a procedural mistake and the Supreme Court affirms that view. Why should there

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be one rule in cases appealed to the Supreme Court and a different one for the Appellate Court: and that in the face of the Statute intended to relieve litigants from procedural errors, and in face of the provsion that the Appellate Court is mentioned in the Section.

In this case the effect of the application of the Illinois rule has been to deny and defeat the dominant rights of the United States citizen instead of protecting and promoting those rights.

The State has no such power over citizens of the United States as to say that their paramount rights under the United States Constituion are waived by a procedural error; and if they do, it is the duty of the United States Courts to come to their rescue when they are found imprisoned upon the arbitrary action of State agencies by their refusal to adjudicate their rights.

Here the relator finds himself imprisoned and unable to assert his paramount rights under the Federal Constitution because the judicial agencies of the State refuse to recognize them because of a supposed procedural error.

Obviously the Appellate Court continues to rule that if a case involving a federal right under the Fourteenth Amendment is taken to that court, the constitutional point is still waived notwithstanding Section 86 of the Civil Practice Act.

Transfer of wrongly appealed cases is mandatory.

The Civil Practice Act provides that when the court finds or adjudges that the case has been wrongly appealed to that court "it shall be the duty" of such court to order the record transmitted to the proper court where it shall proceed as if the cause had been taken there originally.

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Contempt is a civil matter and this case was appealed under the Civil Practice Act and that provision is applicable here.

It is obvious that that statute was intended to cure the very evil here discussed, that by appealing to the Appellate Court constitutional questions were waived. For why should the Act say that the case should be then tried as if it had originally been appealed to the right court; for if it were a constitutional case and the Appellate Court transferred it to the Supreme Court there would be a constitutional question to be decided when the Supreme Court should have received it, were that not so.

That Statute does not require that counsel should object to jurisdiction or move to transfer the case; it makes it the duty of the court to do it when it shall find or adjudge the fact of wrong appeal. Here the Appellate Court found that the case had a constitutional point in it and held in its opinion that it would not decide the point for the reason that constitutional cases should go to the Supreme Court yet the Appellate Court did not transfer the case but held it for the purpose of passing upon other errors assigned.

We respectfully suggest that by Section 86 of the Civil Practice Act the legislature put the appeal procedure upon the ground the constitution intended that no right of appeal should be split up and to cure the practice of the Appellate Court in deciding cases wrongly appealed there, yet omitting to decide the constitutional question, holding it waived. The case should have been transferred when the Appellate Court found and decided the case was in the wrong court.

In the case at bar had the Appellate Court transferred the case to the Supreme Court as was its duty under its finding the Federal Constitutional point would not have

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been held waived. But the failure to transfer and holding the point lost did not destroy the federal constitutional point and the right to have it considered somewhere. The first place a hearing was obtained was in the District Court in this case. Both Illinois Courts refused to consider it.

In the *Parker* case, Vol. 92—No. 13, page 685 Law Ed. Advance Opinions it does not appear that it was pointed out to the court that the practice of passing upon parts of a record in the Appellate Court and refusing to pass on the constitutional questions involved is a violation of the Illinois constitution and statute. Where the case was taken for one purpose it should have retained for all purposes or it should have been transferred under Section 86 of the Civil Practice Act to the Supreme Court. The Act transferring cases to the right court where wrongly appealed was passed, no doubt, to save such situations as the waiver of constitutional rights by errors in procedure.

In the *Parker* case this Court said (P. 687, Vol. 92—No. 13, Law Ed. Adv.):

> "Where federal rights are involved, it is, of course, for this court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them."

And it is for this court to say whether the refusal of the Appellate Court to decide the question of due process or failure to transfer the cause to the Supreme Court and that Court's denial of appeal deprived White of due process of law.

A citizen of the United States is a creature of circumstance when cast in a suit in the State of Illinois. If perchance, he appeals to the wrong court, he is held to have waived his federal constitutional rights regardless of how timely he asserted them or how earnestly he may

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have fought for them, and, notwithstanding the Statute says if the appeal is to the wrong Appellate tribunal, it shall be sent by that court to the proper tribunal, the error in procedure is said to drop the federal constitutional rights by the wayside. In other words he is held to have waived his suposedly great constitutonal rights by that little error notwithstanding his actual intention to protect them, and that his appeal is for the sole purpose of protecting them.

And notwithstanding those constitutional rights are guaranteed by the basic law of the land they must be fought for all over again in the courts and with the courts; and if there be a miscue in procedure everything is lost.

It seems that the whole attitude of the State courts is to defeat constitutional rights instead of advancing them and protecting them. This record so indicates.

The balance wheel of protection is and should be the United States courts and they should come to the rescue of the United States citizen who has lost his consttutional rights in the maze of State court procedure or technique.

The point is that the United States citizen should not have to depend for his liberty on a construction by a State court of a law which involves his federal rights, *i.e.*, in the last analysis, he should have a right to apply to the Federal courts to protect his real rights regardless of the errors of the State courts, or its peculiar procedure.

Here all that was asked by White in his case was that the basic laws in the federal constitution be obeyed and applied. That is in no sense asking for a construction of the constitution, nor is it a constitutional question; it is only a matter of obeying the Fourteenth Amendment which now is basic law of the States as well as the United States.

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For State purposes the rule of decision on the matter of the route of appeal and waiving a State constitutional point if a slip up is made in the effort to appeal, ought not concern the United States citizen, but, for federal purposes, and a citizen of the United States the rule of decision should be one that comports with federal rights and which recognizes that equal protection of laws requires that a reasonable construction be placed on procedural errors. State court procedures should not be permitted to destroy or deny the rights of the United States citizen to the protection of his federal constitutional rights.

The rule should be that court procedure of a State cannot work a forfeiture or waiver of the constitutional rights of a United States citizen. Constitutional rights are not actually waived unless intentionally waived and that should be the rule to be applied for uniformity throughout the United States.

III.

Comity does not respect a void judgment that holds a citizen in prison. The constitutional guaranty is the highest in order of respect. Comity begins at home.

The rule that requires that the United States courts pause before discharging a citizen of the United States when held under state process, is said to rest upon the doctrine of comity; but we suggest that the guarantee of due process of law stands above the courteous relationship of two systems of courts.

Here the Court had before it a citizen of the United States who was being held and imprisoned under void State process, and also the law enforcing agency of the State of Illinois stood urging the continuation of that imprisonment. The Judge could not believe that the doctrine of comity required him to remand petitioner to imprisonment upon

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void process where the acredited law enforcing officer of the State stood before him insistng that the imprisonment must continue. Rather, it would seem that the Judge felt that comity, like charity, begins at home, and that the doctrine required that the State of Illinois should first respect and observe the basic law of the land before it might insist that its judgment before the Court be respected on the ground of comity.

Comity does not go to the absurd length of requiring that one judicial system should respect the void pronouncements of the other. On the contrary, the rule is that a void judgment may be attacked anywhere, any time, under any circumstances, collaterally or directly, in court or out, it matters not; any time before final judgment is entered upon the record.

Comity respects valid judgments, but never void judgments.

Why should courts stand on ceremony when a United States citizen, admittedly wrongfully imprisoned, stands waiting at the door of the cell, when one stroke of the pen will free him?

IV.

Having granted certiorari relator's cause should be heard before the bar of the Court.

Here the Superior Court arbitrarily and without jurisdiction imprisoned in violation of relator's right to due process. The Appellate Court of Illinois refused to consider relator's right to due process. The Supreme Court of Illinois did likewise. The first court in which relator got a hearing on that question was the District Court the judgment of which the Court of Appeals affirmed.

By its order here this Court has decided the cause without opportunity to be heard upon the merits of the case;

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and it is respectfully urged that this cause should not have been reversed without a hearing upon relator's rights to be free from an illegal imprisonment, and should now be reinstated upon the docket and relator be given an opportunity to be heard before the bar of the court; otherwise the judgment of the Court of Appeals should be affirmed. The claim of due process of law here made should not be disposed of as of course without hearing. Relator suggests that such disposition again denies due process of law.

Wherefore petitioner by his counsel respectfully prays the Court to reconsider the record in light of the foregoing suggestions to the end that the petition for certiorari be denied or in the alternative that the order reversing the judgment of the Court of Appeals be set aside and the cause be heard upon its merits; or in the alternative that this petition for rehearing be set for oral argument under direction of the court.

Respectfully submitted,

JOSEPH I. BULGER,
ODE L. RANKIN,
Counsel for Respondent.

Certificate of Counsel.

The undersigned as counsel for petitioner, Ralph E. White in the above and foregoing Petition for Rehearing and proceeding, do hereby certify that the foregoing Petition is presented in good faith. I further certify that the several points presented are worthy of consideration and that the Petition is not presented for delay.

JOSEPH I. BULGER,
ODE L. RANKIN,
Counsel for Petitioner.

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